OMY & ORS v. KEMENTERIAN DALAM NEGERI & ANOR

HIGH COURT MALAYA, JOHOR BAHRU
NURULHUDA NUR'AINI MOHAMAD NOR J
[ORIGINATING SUMMONS NO: JA-24NCvC-675-07-2022]
14 SEPTEMBER 2023

Abstract – *The word 'child' means a child that is born or a child before birth, as envisaged in the Convention on the Rights of the Child ('Convention') that the international commitment pledged and agreed to abide to. The principle 'acting in the best interests of the child' as promoted by the Convention must be accorded a wider spectrum by acknowledging that the protection of the child includes safeguarding the interests of a child even before birth. Laws are regulated to ensure the safety of the community, including the children and to provide guidelines. Thus, it is only just and fair that the legal protection be extended to cover protection against illegal activities, amongst others, child trading, that can be seen happening at present to even an unborn child. Considering the surge in cases involving child trading, it is the court's duty not to be too lenient in interpreting the Federal Constitution.*

CONSTITUTIONAL LAW: *Citizenship – Application – Issuance of birth certificate of child – Citizenship status stated as 'bukan warganegara' – Application for citizenship of child under art. 15A of Federal Constitution ('FC') – Whether birth place of child ascertained – Whether identity of child's mother obtained – Whether principle of jus soli satisfied – Whether presumption under s. 19B Part III Second Schedule of FC applicable – Whether child traded for money – Whether violated child's right under FC – Whether child 'exposed' or 'abandoned' – Whether allowing relief sought would mean legalising of child trading*

The facts in this case gave rise to a very crucial re-examination and thorough inspection of the principle 'acting in the best interest of the child' as found engraved in the Convention on the Rights of the Child ('Convention'). The first and second applicants were husband and wife. A birth certificate ('BC1') was issued with the names of both the first and second applicants as parents, 'bapa' and 'ibu' of Chinese race, date and place of birth of the third applicant ('child') and the child recorded as a 'citizen'. When the child turned 12, the first and second applicants applied for the child's IC using BC1 but the application was rejected by the first respondent with BC1 impounded by the first respondent. A new birth certificate was issued ('BC2') with the child's citizenship status written as 'bukan warganegara' with place of birth stated as 'Sinova Medical Centre Johor Bahru' and, as deposed in the affidavit in support of this application, 'maklumat ibu dan bapa anak buangan TIDAK DIPEROLEHI'. Both the applicants then applied to adopt the child with an

adoption order by the Sessions Court obtained and, a new birth certificate issued ('BC3'), with the child's citizenship stated as 'bukan warganegara'. The applicants made an application to the second respondent for citizenship of the child under art. 15A of the Federal Constitution ('FC'). When there was no reply from the second respondent, the applicants filed this motion. The first and second applicants admitted, *inter alia*, that (i) they were not the child's parents by birth; (ii) the information of the child's birth reached them through a friend; (iii) the child had been abandoned/exposed/unwanted by the birth parents whose identity were unknown; (iv) an advertisement in a Tamil newspaper to search for the natural parents met with a failure as no one responded; and (v) a search for the Sinova Medical Centre revealed that it was no longer in operation.

Held (dismissing application):

(1) Despite the first applicant's denial that 'RJ3' was his statement and the contents therein were not what he had disclosed to the respondent, there would be no other avenue for the respondent to know of the RM20,000 payment made to a third person if not for 'RJ3'. As such, the court found that 'RJ3' was given by the first applicant to the respondent and could be relied upon being a statement recorded under 'Peraturan 21' of the Peraturan-Peraturan Pendaftaran Negara 1990. Otherwise, there were no other evidence to explain why the respondent acted to the contrary by issuing BC3, going against BC1 that was similarly issued by the respondent earlier. (para 17)

(2) Article 14(1)(b) of the FC concerns citizenship by operation of law anchored on the concepts of *jus soli* and *jus sanguinis*. It could not be ascertained whether the child was in fact born at Sinova Medical Centre. The first applicant was handed custody of the child at the age of the child a day old at a house in Kulai. Hence, the place of birth was disputed and unknown. The *jus soli* principle was therefore, not satisfied. (paras 24, 33 & 34)

(3) Presumption in s. 19B Part III Second Schedule of the FC was tied to the place of birth. Before the presumption could be triggered, the child must first be 'found abandoned'. The birth mother of the child, the doctor, the agent and the first applicant, who had planned the trading of the child for money, were all acting in concert to go against the rights of the child encompassed in the Federal Constitution and other written laws of this country. The unavailable identity of the mother, the agent and the maternity records raised more questions to this matter. This was added by the absence of a police report as required under s. 9 of the Births and Deaths Registration Act 1957. Hence, the totality of the facts gave rise to a finding that the child was not 'exposed' or 'abandoned'. (paras 36, 38 & 39)

(4) The fact that the child ended in a good home should not deviate from the real issue that trading of a child is against the law, even without any prosecution being brought by the Public Prosecutor. This court should not further proceed to legalise the trading of this child by allowing the relief sought by the first and second applicants for citizenship of the child as otherwise the floodgate would be open for more illegal cases of such nature of a traded child regardless of a Malaysian birth mother or unknown, having foreseen it ends with a justified result of citizenship to the said child. (para 40)

Obiter:

(1) The rights accorded to a child in the Convention encompasses rights of legal protections before and after birth, and is applicable to all children. Therefore, it is only just and fair that the legal protection be extended to cover protection against such illegal activity that can be seen happening at present to even an unborn child by a clear prohibition against such acts that goes to the root cause. To quote Judge Ida Malosi, Principal Youth Court Judge of New Zealand, 'law is but a blunt instrument to protect children. It needs to be tampered with common sense and often these two do not co-exist'. Currently, from the reported cases, this court takes judicial notice of a surge in such applications with the involvement of a third-party having information of a newborn child but went missing or could not be contacted subsequently. It is equally this court's duty not to be too lenient in interpreting the Federal Constitution so as to go against the protection and policies accorded by the Federal law, they being constitutionally enacted and passed by Parliament. (paras 41 & 42)

Case(s) referred to:

AKL & Anor v. Pendaftar Besar Kelahiran Dan Kematian, Malaysia [2023] 1 LNS 341 HC ***(refd)***

Auengchoon & Anor v. Ketua Pengarah Pendaftaran Negara Malaysia & Ors [2023] 1 LNS 336 HC ***(refd)***

CCH & Anor v. Pendaftar Besar Bagi Kelahiran Dan Kematian, Malaysia [2022] 1 CLJ 1 FC ***(dist)***

Chong Siew Tha & Anor v. Pendaftar Besar Kelahiran dan Kematian, Malaysia [2023] 1 LNS 853 HC ***(refd)***

CTEB & Anor v. Ketua Pengarah Pendaftaran Negara, Malaysia & Ors [2021] 6 CLJ 471 FC ***(refd)***

Kerajaan Negeri Pahang Darul Makmur & Ors v. Seruan Gemilang Makmur Sdn Bhd [2008] 6 CLJ 611 CA ***(refd)***

Lau Tek Peng & Ors v. Kementerian Dalam Negeri & Anor [2023] 1 LNS 376 HC ***(refd)***

Madhuvita Janjara Augustin (Suing through next friend, Margaret Louisa Tan) v. Augustin Lourdsamy & Ors [2018] 4 CLJ 758 CA ***(refd)***

Legislation referred to:

Births And Deaths Registration Act 1957, ss. 9, 15, 27

Federal Constitution, arts. 1(b), (e), 8, 14(1)(b), 15A, 19B, Part III

Other source(s) referred to:
Black's Law Dictionary, 7th edn, 1999, p 1414

For the applicant - Alvin Chang Teck Kiam & Chai Yong Wei; M/s Alvin's Chang Chamber
For the respondents - Zahilah Mohammad Yusoff & Syazana Lajis; SFC

Reported by S Barathi

JUDGMENT

Nurulhuda Nur'aini Mohamad Nor J:

[1] The facts in this case give rise to a very crucial re-examination and thorough inspection of the principle 'acting in the best interest of the child' as found engraved in the international agreement known as the Convention on the Rights of the Child. On a microscopic analysis of the said convention that focuses on the rights of children which the international leaders including Malaysia had readily ratified by putting forward their willingness to be committed to it, it cannot be disputed that the meaning of the word 'child' means a child that is born or a child before birth, this is envisaged in the contents of the convention that the international commitment pledged and agreed to abide to.

[2] For ease of reference, the relevant parts of the Convention are produced below:

> **Convention on the Rights of the Child**
>
> **Preamble**
>
> "…
>
> Bearing in mind that, as indicated in the Declaration of the Rights of the Child, "the child, by reason of his physical and mental immaturity, needs special safeguards and care, **including appropriate legal protection, before as well as after birth"**. (emphasis added)
>
> …
>
> **Article 2**
>
> 1. States Parties shall respect and ensure the rights set forth in the present Convention to each child within their jurisdiction without discrimination of any kind, irrespective of the child's or his or her parent's or legal guardian's race, colour, sex, language, religion, political or other opinion, national, ethnic or social origin, property, disability, birth or other status.
>
> 2. States Parties shall take all appropriate measures to ensure that the child is protected against all forms of discrimination or punishment on the basis of the status, activities, expressed opinions, or beliefs of the child's parents, legal guardians, or family members.

Article 3

1. In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.

2. States Parties undertake to ensure the child such protection and care as is necessary for his or her well-being, taking into account the rights and duties of his or her parents, legal guardians, or other individuals legally responsible for him or her, and, to this end, shall take all appropriate legislative and administrative measures.

3. States Parties shall ensure that the institutions, services and facilities responsible for the care or protection of children shall conform with the standards established by competent authorities, particularly in the areas of safety, health, in the number and suitability of their staff, as well as competent supervision.

...

[3] In addition to this Convention, Malaysia has equally introduced Acts of Parliament in the form of various laws that accord the same spirit as contained in the said Convention. The first is extracted from the provisions in the Child Act 2001 as follows:

Child Act 2001

Part V – Children In Need Of Care And Protection

Chapter 1 – General

Section 17. Meaning of child in need of care and protection.

(1) A child is in need of care and protection if:

(a) the child has been or there is substantial risk that the child will be physically injured or emotionally injured or sexually abused by his parent or guardian or a relative; [Subs. Act A1511]

(b) the child has been or there is substantial risk that the child will be physically injured or emotionally injured or sexually abused and his parent or guardian, knowing of such injury or abuse or risk, has not protected or is unlikely to protect the child from such injury or abuse;

(c) the parent or guardian of the child:

(i) is unfit, or has neglected, or is unable, to exercise; or

(ii) has acted negligently in exercising, proper supervision and control over the child;

[Ins. Act A1511]

(d) the parent or guardian of the child has neglected or is unwilling to provide for him adequate care, food, clothing and shelter;

(e) the child:

(i) has no parent or guardian; or

(ii) has been abandoned by his parent or guardian and after reasonable inquiries the parent or guardian cannot be found;

…

[4] Further protection is found in Part VIII of the said Act that provides against treating a child as commodity for trade, as follows:

Child Act 2001

Part VIII – Trafficking In And Abduction Of Children

Section 48. Unlawful transfer of possession, custody or control of child.

(1) Any person who takes part in any transaction the object or one of the objects of which is to transfer or confer, wholly or partly, temporarily or permanently, the possession, custody or control of a child for any valuable consideration commits an offence and shall on conviction be liable to a fine not exceeding fifty thousand ringgit or to imprisonment for a term not exceeding twenty years or to both. [Subs. Act A1511]

(2) Any person who without lawful authority or excuse harbours or has in his possession, custody or control a child with respect to whom the temporary or permanent possession, custody or control has been transferred or conferred for valuable consideration by any other person within or outside Malaysia commits an offence and shall on conviction be liable to a fine not exceeding ten thousand ringgit or to imprisonment for a term not exceeding five years or to both.

(3) For the purposes of subsection (2), if any person harbours or has in his possession, custody or control a child without lawful authority or excuse, the child shall, until the contrary is proved, be presumed to be a child with respect to whom the temporary or permanent possession, custody or control has been transferred or conferred for valuable consideration.

(4) It shall be a defence in any prosecution under this section to prove that:

(a) the transfer took place in contemplation of or pursuant to a *bona fide* marriage or adoption; and

(b) at least one of the natural parents of the child or the guardian of the child was a consenting party to the marriage or to the adoption by the adopting party, and had expressly consented to the particular marriage or adoption.

[5] A more enhanced provisions of the law enacted to equally protect the child with extended extra territorial provisions can be found in the ATIPSOM law as follows:

Anti-Trafficking In Persons and Anti-Smuggling of Migrants Act 2007

Part I – Preliminary

Section 3. Scope of application

The offences under this Act apply, regardless of whether the conduct constituting the offence took place inside or outside Malaysia, and whatever the nationality or citizenship of the offender in the following circumstances:

[Am. Act A1385]

(a) if Malaysia is the receiving country or transit country or the exploitation occurs in Malaysia; or

[Am. Act A1385]

(b) if the receiving country or transit country is a foreign country but the trafficking in persons or smuggling of migrants starts in Malaysia or transits Malaysia.

[Subs. Act A1385]

Section 4. Extension of Act to extra territorial offences

Any offence under this Act committed:

(a) on the high seas on board any ship or on any aircraft registered in Malaysia;

(b) by any citizen or permanent resident of Malaysia on the high seas on board any ship or on any aircraft; or

(c) by any citizen or any permanent resident in any place outside and beyond the limits of Malaysia,

may be dealt with as if it had been committed at any place within Malaysia.

Part III – Trafficking In Persons Offences, Immunity, *etc.*

Section 14. Offence of trafficking in children or a person who is unable to fully take care of or protect himself because of a physical or mental disability or condition

(1) Any person, who traffics in persons being a child or a person who is unable to fully take care of or protect himself because of a physical or mental disability or condition, commits an offence and shall, on conviction, be punished with imprisonment for life or with imprisonment for a term which shall not be less than five years, and shall also be liable to whipping.

[Subs. Act A1644]

(2) In a prosecution for an offence under this section, the means used against a trafficked person who is a child or a person who is unable to fully take care of or protect himself because of a physical or mental disability or condition is irrelevant and is not a requirement to be proved.

[6] Last but not least, the most recent law enacted to further enhanced the protection of children can be seen in the year 2017 when Act 792 was introduced.

Sexual Offences Against Children Act 2017 [Act 792]

Part I – Preliminary

Section 3. Extra-territorial application

If any offence under this Act, or any offence specified in the Schedule where the victim is a child is committed by a Malaysian citizen against any child in any place outside Malaysia, he may be dealt with in respect of such offence as if the offence was committed at any place within Malaysia.

Part II – Offences Relating To Child Sexual Abuse Material

Section 7. Using a child in making, producing, directing the making or production of, *etc.*, child sexual abuse material

Any person who uses or causes to be used a child in the preparation to make or produce, or in the preparation to direct the making or production of, or in the making or production of, or in the directing of the making or production of, any child sexual abuse material commits an offence and shall, on conviction, be punished with imprisonment for a term not exceeding twenty years and shall also be punished with whipping of not less than five strokes.

Explanation – This section does not apply where the preparation to make or produce or the preparation to direct the making or production of child sexual abuse material or where the making or production or the directing of the making or production of child sexual abuse material uses or causes to be used a person appearing to be a child.

[7] All these laws exist hand in hand with the Penal Code provisions to further safeguard and protect the child, born or before birth that contain provisions as follows:

Causing Miscarriage; Injuries to Unborn Children; Exposure of Infants; and Concealment of Births

Section 312. Causing miscarriage.

Section 313. Causing miscarriage without woman's consent.

Section 314. Death caused by act done with intent to cause miscarriage. If act done without woman's consent.

Section 315. Act done with intent to prevent a child being born alive or to cause it to die after birth.

Section 316. Causing death of a quick unborn child by an act amounting to culpable homicide.

Section 317. Exposure and abandonment of a child under twelve years by parent or person having care of it.

Section 318. Concealment of birth by secret disposal of dead body.

Best Interests Of The Child: What It Means

[8] With these laws in place, the principle 'acting in the best interests of the child' as promoted by the Convention must be accorded a wider spectrum by acknowledging that the protection of the child includes safeguarding the interests of a child even before birth. It means that the interests the Convention speaks of, governs the best interests of all children before birth and after birth. Put it in another way, the Convention contemplated the sacrifice of the rights of one child, after the child's birth for the advantage of other children prior to being born, this being made with the aim that all these prohibitions that the laws are trying to contain is achieved.

[9] To begin with, one must accept that laws are regulated amongst others to ensure the safety of the community (including the children, they being the future generation) and to provide as guidelines what is acceptable behaviour and what is not, what can be said as permissible and what is not. Arising from this too, the determination of the citizenship of a child is set out in great detail in the Federal Constitution itself.

The Law On Citizenship In The Federal Constitution

[10] The provisions on citizenship in the Federal Constitution can be found in Part III, with further and better particulars can be seen in the first and second schedule as referred to in Part III of the Federal Constitution. In the application before this court, the applicants relied on art. 14(1)(b) of the Federal Constitution 'Citizenship by operation of law of persons born on or after Malaysia day',[1] ss. 1(b)[2] and 1(e)[3] of 2nd schedule Part II and s. 19B Part III Second Schedule[4] of the Federal Constitution.

[11] The importance of citizenship of a person relates back to, amongst others his or her fundamental liberty as envisaged in art. 5 which makes a distinction pertaining to the individual's right to be heard and be released without any further remand, contrary to a non-citizen. The equality before the law under art. 8 is further guaranteed to a citizen with protection against banishment, freedom of speech, movement and association, rights to education clearly written in the Federal Constitution ensuring every citizen has the respective access to these fundamental liberties. As such, it is only correct and proper that any application for recognition of citizenship status, strict proof must accompany the said evaluation of the application and the analysis of the facts and history that brought about the said application be scrutinised, as transpired in this case.

[12] In carrying out this exercise, the provisions of other laws must also come into play to ensure the said child is not planted by any known or unknown individual, by a syndicate for profit knowing there is market for abandon child that eventually be legalised by way of adoption process on the basis of 'acting on the best interests of the child'. In this present case, the said fear that the laws clearly try to contain and prohibit by protecting the innocent child or children against such danger, could be said to have existed.

[13] Therefore, it is only with strong scrutiny and acting within these perimeters of the laws, this court now proceed to examine the background of the child third applicant (the child) in order to ascertain who has the burden to show the child is 'abandoned' or as specified under the Federal Constitution, 'exposed' and if the burden stipulated by the Federal Constitution is discharged. This court in doing so, remind itself of the inevitable deduction that although the end intention in conferment of citizenship to the child, one that is morally and legally important, the primary method employed in achieving it cannot be in transgression with any of the laws as enumerated above. In short, the end does not justify the means.

Background Facts

[14] With this purpose set as the approach to be taken by this court, the facts sieved put together by this court must be gathered from the conflicting versions put forward by both the applicant and the respondent in their respective affidavits but yet, what is supported in another way by other available documents. For this purpose, the background of the said application is summarised below as extracted from the affidavit in support of the application encl. 2 and the birth certificates annexed:

(i) both the first and second applicants are husband and wife;

(ii) a birth certificate 1 (BC1) contained the names of both the first and second applicant as parents 'bapa' and 'ibu' of Chinese race, date of birth of the third applicant as 8 June 2005 and place of birth Sinova Medical Centre and the third applicant recorded as 'citizen' (the BC1 dated 10 June 2005 registered number BL 75598);

(iii) when the child turned 12, both the applicants applied for the child's IC using the BC1 but was rejected by the first respondent with BC1 impounded by the first respondent;

(iv) a new birth certificate dated 16 July 2018 with registration number BL 75598 was issued (BC2) with the child's citizenship status written as 'bukan warganegara' with place of birth stated as 'Sinova Medical Centre Johor Bahru' and as deposed in the affidavit in support of this application para. 8 'maklumat ibu dan bapa anak buangan **Tidak Diperolehi**';

(v) both the applicants then applied to adopt the said child with the adoption order by the Session Court dated 23 December 2018 was obtained and a new birth certificate 3 issued (BC3 registered number C0095/2019 serial number 002262XA) dated 21 February 2019 with the child's citizenship stated as 'bukan warganegara';

(vi) an application in 'Borang B' for citizenship of the child under art. 15A of the Federal constitution was made by both the applicants dated 10 March 2019 to the second respondent, but with no reply coming from the said respondent moved both the applicants to file this motion before this court.

[15] Based on this same affidavit encl. 2, the applicants admitted in paras. 16 to 24 as follows: A

(i) they are not the third applicant's parents by birth;

(ii) the information of third applicant's birth reached both the applicants through a friend; B

(iii) the child had been abandoned/exposed/unwanted by the birth parents whose identity are unknown;

(iv) advertisement in a Tamil newspaper to search for the natural parents met with a failure as no one responded;

(v) a search for the Sinova Medical Centre revealed it no longer in operation. C

[16] The respondents in their affidavit in reply encl. 6 in answer to encl. 2 said as follows:

(i) the applicants had, on 10 June 2005 notified the Registration Department of the birth of the child with the respective applicants' names appeared as parents, the place of birth said to be at Sinova Medical Centre born on 8 June 2005 at 8.53am (see 'RJ2' to encl. 2); D

(ii) on the child's (third applicant) 12th year of age and on the 'parents' application for the child's IC, the registration department having noted the difference in the face and colour of the skin between the parents and the child (third applicant), revoked the said application and proceeded to investigate that led to the discovery as follows: E

1. (see the statement of the first applicant exh. 'RJ3' to encl. 2) F

i. They are not the parents by birth of the said child;

ii. The birth was notified to them and custody of the child with a doctor's letter obtained from an agent for a sum of RM20,000;

iii. The agent said the child of a Chinese origin but applicants now said they were in fact cheated; G

iv. The registration of the child done by way of form JPN LM01 obtained from the agent;

v. The actual birth place of the child unknown;

vi. With the registration of JPN LM01 successful, there was no fear on the part of the applicants for further actions in relation to the third applicant until the intervention by the respondents when application was made by the applicants for the third applicant's IC when he turned 12. H

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2. 'RJ12' shows 'Sinova Medical Centre' registered with KKM (Kementerian Kesihatan Malaysia) on 13 January 2005 with license issued from 13 January 2005 to 12 January 2006 (see 'RJ13') but subsequently changed its business name to 'Landmark Medical Centre' on 6 June 2005 (see 'RJ15') both these private clinics operated by Doctor Robert Luk.

3. (see: Doctor Robert Luk statement in 'RJ4' and exh. 'RJ2' which states Doctor Robert Luk as Doctor who was responsible for the delivery):

   i. said unable to confirm nor furnish any documents as proof of the child's birth as his office the Landmark Medical Centre was raided by the police on 24 May 2008 and documents were confiscated by police for investigation pertaining to trafficking of children.

[17] The first applicant in their affidavit in reply encl. 7 para. 5.10 denied 'RJ3' as his statement and said that the contents are not what as he had disclosed to the respondent. Yet, he did not deny that the signature in 'RJ3' is his. Furthermore, to this court's finding, there would be no other avenue for the respondent to know of the RM20,000 payment made to a third person if not for 'RJ3'. As such, to this court's finding, 'RJ3' was given by the first applicant to the respondent and can be relied upon being a statement recorded under 'Peraturan 21' of the 'Peraturan-Peraturan Pendaftaran Negara 1990. Otherwise, there are no other evidence to explain why the respondent acted to the contrary by issuing BC3, going against BC1 that was similarly issued by the respondent earlier.

[18] The applicants in encl. 11 deposed that based on 'RJ12' to the respondent's affidavit encl. 6, 'Sinova Medical Centre Johor Bahru' had changed its name to 'Landmark Medical Centre' beginning from 6 June 2005. This court observed that the KKM's documents 'RJ12', 'RJ13' and 'RJ15' reflected this change but nothing was said of this change by Doctor Robert Luk in his statement 'RJ4'. Therefore, the name 'Sinova Medical Centre' should no longer be used beginning from 6 June 2005. With the child's birth said to be 8 June 2005, it can only mean the particulars in 'RJ2' stating the child was born in 'Sinova Medical Centre' cannot be true. The reason given by Doctor Robert that the documents are not in his custody having been confiscated by the police on 24 May 2008, to this court's view is merely an excuse to cover up his illegal activity and moved this court to a finding that the child was not born in 'Sinova'.

[19] In addition, having found the first applicant's statement 'RJ3' was made by him, 'RJ3' said that the baby was of a day old when the delivery of the baby and payment of the said sum made at a house in Kulai. This pushed this court to a finding that the respondent, based on the applicants' own affidavits had refuted the evidence that the said child was born in 'Sinova Medical Centre'.

[20] As to the payment of RM20,000, the applicants' affidavit encl. 7 did not deny the said amount of payment made but said it was paid to a friend of the applicant's acquaintance, to be paid to the child's mother for her personal care tonic. What is most important is that the applicants in para. 5.10.1 and para. 5.10.7 of encl. 7, did not deny para. 5.4(a)(i) and para. 5.4(a)(x) of the respondent's affidavit encl. 6 that deposed as follows:

Para 5.4(a)(i)

Pemohon ketiga bukan anak kandung Pemohon Pertama dan Pemohon Kedua.

Para 5.4(a)(x)

Pemohon Pertama tiada pergi ke klinik Sinova tetapi beliau tahu akan kewujudan klinik Sinova itu.

[21] On 5 May 2018, the BC3 was then altered and amended by way of 'RJ5' under ss. 15 and 27 of the Births And Deaths Registration Act 1957 based on the filled up application form 'RJ8' by the applicants to amend the details of the parents from both the applicants' names to 'information unavailable'. With this amendment, both the applicants' adoption of the third applicant by order of the Sessions Court was registered on 29 November 2018 with his citizen status being stated as 'non-citizen' (see: 'RJ9').

[22] With this change of the status of the third applicant, on 10 March 2019 the applicants initiated an application for citizenship of the third applicant under art. 15A of the Federal Constitution. At the time of hearing of this application, no reply from the respondent of the said application is available. It is therefore, now of utmost significance to deliberate on art. 15A and the present application under art. 14(1)(b), the distinctions if any and if either have been satisfied by the applicants.

Principle Of *Stare Decisis*: Can Court Differ Not To Follow

[23] For this purpose, the principles set by the apex courts is of utmost important. In *Madhuvita Janjara Augustin (Suing Through Next Friend, Margaret Louisa Tan) v. Augustin Lourdsamy & Ors* [2018] 4 CLJ 758 a decision by the Court of Appeal on art. 14(1)(b) said in held (3) "In the case of art. 14(1)(b) read with s. 1(a) Part II, Second Schedule of the FC, citizenship by operation of law was anchored on elements of both concepts of *jus soli* and of *jus sanguinis*. Citizenship is claimed by virtue of these two rights, right of being born in the territory of Malaysia and by right of one or both parents who are citizens of Malaysia".

[24] Although the principle on illegitimate child in *Madhuvita*, the court having been equipped with the fact that the father of the child a Malaysian citizen although mother a citizen of Papua New Guinea and marriage not registered at the time of the child's birth, "the fact that the biological parents

of the appellant were not married to each other at the time of the appellant's birth did not alter or diminish their capacities as parents of the appellant", was set aside by the Federal Court in its majority decision in *CTEB & Anor v. Ketua Pengarah Pendaftaran Negara, Malaysia & Ors* [2021] 6 CLJ 471; [2021] 5 AMR 661; [2021] 4 MLJ 236 ("*CTEB*"), the principle on art. 14(1)(b) concerns citizenship by operation of law anchored on concepts of *jus soli* and *jus sanguinis* remains.

[25] A more recent case with almost similar facts with this present case but not exactly the same, which is of relevance is the Federal Court case in *CCH & Anor v. Pendaftar Besar Bagi Kelahiran Dan Kematian, Malaysia* [2022] 1 CLJ 1. It is important to lay the facts in *CCH* for this court to make come to a determination if the *stare decisis* principle applies or otherwise, subject to any distinct facts that may move this court to a different finding by distinguishing the related facts. This is because principles in a case would more often than not, relate back to the facts in that particular case and any reasons to depart must necessitate a finding made on the distinct facts. In short, like cases will be treated alike and not otherwise.

[26] In *Kerajaan Negeri Pahang Darul Makmur & Ors v. Seruan Gemilang Makmur Sdn Bhd* [2008] 6 CLJ 611; [2008] MLJU 406, the Court of Appeal in deliberating on this issue of *stare decisis*, quoted with approval these journals as follows which amongst others permits the non-following of earlier decisions on *stare decisis* principle safe for only 'urgent cases and exceptional reasons', 'out of accord with authority or established principle': (i) by *Black's Law Dictionary*, 7th edn, 1999 at p. 1414 as:

> "The doctrine of precedent, under which it is necessary for a court to follow earlier judicial decisions **when the same points arise again in litigation**". See *Precedent; Non Quieta Movere. Cf. Res Judicata; Law Of The Case.*
>
> > The rule of adherence to judicial precedents finds its expression in the doctrine of *stare decisis*. This doctrine is simply that, when a point or principle of law has been once officially decided or settled by the ruling of a competent court in a case in which it is directly and necessarily involved, it will no longer be considered as open to examination or to a new ruling by the same tribunal, or by those which are bound to follow its adjudications, **unless it be for urgent reasons and in exceptional cases.** William M. Lile *et al., Brief Making and the Use of Law Books* 321 (3d ed. 1914).
> >
> > The general orthodox interpretation of *stare decisis* … is *stare rationibus decidendis* ('keep to the *rationes decidendi* of past cases'), but a narrower and more literal interpretation is sometimes employed. To appreciate this narrower interpretation it is necessary to refer … to Lord Halsbury's assertion that a case is only authority for what it actually decides. We saw that situations can arise in which all that is binding is the decision. According to Lord Reid, such a

situation arises when the *ratio decidendi* of a previous case is obscure, out of accord with authority or established principle, or too broadly expressed'. Rupert Cross & J.W. Harris, *Precedent in English Law* 100-01 (4th ed. 1991)'.

(b) by Saul Brenner & Harold J. Spaeth, on *Stare Decisis*, 1995, as promoting "efficiency of the court, consistency in the law, fairness and legitimacy"; and

(c) by the case of *Robertson v. Daimler Chrysler Corp*, 641 N.W. 2d 567, 580 [Mich. 2002] which in turn quoted the case of *Hohn v. United States*, 524 U.S. 236, 251 [1998] as promoting "the even handed, predictable, and consistent development of legal principles, fosters reliance on judicial decisions, and contributes to the actual and perceived integrity of the judicial process".

[27] For this purpose, the table below that set the clear facts between the two cases would assist this court and the higher courts in coming to a finding that the facts are indeed distinct:

Principle	**Facts In *CCH***	**Facts In The Present Case**
Jus Soli	Child born in HUKM	Child said born in private clinic 'Sinova Medical Center' (see: 'RJ-2 enclosure 6) but the applicants' affidavit enclosure 7 para 5.10.7 did not refute the deposition by the Respondent in para statement 5.4(a)(x) enclosure 6 that the child was not delivered at the said centre. See also 'RJ-12' on the disparity of the dates of the change of business from 'Sinova Medical Centre' to 'Landmark Medical Centre' as 6.6.2005 whilst the birth of the 3rd applicant noted in 'RJ-2' and BC to be 8.6.200 at Sinova.
Jus Sanguinis	Identity of mother unknown. No reasons given by the Respondent except the applicants are not the birth parents of the child	Identity of mother unknown. Respondent deposed: Different facial façade and colour of skin. This is supported by the fact that advertisement for natural parents for purpose of adoption was made by the applicants in a Tamil newspaper. 1st applicant admitted this in his statement 'RJ-3' that he was cheated by the agent who said child of Chinese origin.

		Investigation by Respondent: statement of 1st applicant revealed the said child aged a day old was obtained from an agent for a sum of RM20,000.00 and delivered by the agent not at the Medical Centre but a house in Kulai.
		The form LM01 was obtained from the said agent with the Doctor's letter.

[28] The Federal Court in *CCH* (*supra*) at p. 18 laid the following principles:

> [50] When construing a word or words in the FC protective of or guaranteeing a fundamental right, the court should give their widest possible meaning without changing or warping the "base" meaning. And when construing interrelated provisions, the court should read them as a whole having regard to the purpose and intent of those provisions and harmonise their collective meaning rather than put them at odds with another.
>
> [51] With the above principles in mind, we now come to s. 1(a) of Part II and s. 19B of Part III.
>
> [52] Section 1(a) of Part II very clearly adopts the concepts of *jus soli* (citizenship based on birthplace) and *jus sanguinis* (citizenship based on blood relation). Section 19B in turn contains two presumptions – one of which relate to *jus sanguinis*.
>
> [53] The operative words in s. 19B are "any newborn child found exposed in any place". The purpose of this section, when read in context, must be to cover newborn children who are left and discovered in a place without any trace of their biological parents. We take judicial notice of the harsh realities of life: this includes newborn children left abandoned near dumpsites, baby hatches, public or school toilets, places of worship and so on. A literal meaning of "exposed" suggests a newborn child who was "discovered" exposed at any of these locations.
>
> [54] As such, the broadest possible interpretation of the word "found exposed" is to accord it a meaning to include a child abandoned at the place of birth by the birth mother whose identity is unknown. The operative word "exposed" in s. 19B must therefore encompass the plight of abandoned newborn children, otherwise the overarching intent of preventing statelessness would be defeated or rendered illusory.

[29] One crucial reminder of the Federal Court in interpreting the Federal Constitution that guides this court in the analysis, is found at p. 17 as follows:

> [45] Before proceeding to examine s. 19B with those principles in mind, we seek to remind ourselves of other important concepts on constitutional interpretation.
>
> [46] Citizenship no doubt is governed by Part III of the FC, but it is also a concept so inextricably linked to the right to life and personal liberty contained in art. 5(1). As such, any provisions on it must be construed as widely as possible.

[30] With this as the background in interpreting the Constitution, the dissenting judgment of the Federal Court in an earlier case of *CTEB* (*supra*) was relied by the panel in *CCH* as follows:

> … the dissenting judgment of this court in *CTEB & Anor v. Ketua Pengarah Pendaftaran Negara, Malaysia & Ors* [2021] 6 CLJ 471; [2021] 4 MLJ 236 ("*CTEB*") where it was stated that Part III which contains enabling provisions is meant to aid or assist in the interpretation of Parts I and II, and not to qualify or conditionalise the application of Parts 1 and II to Part III. The dissenting judgment had commented on s. 19B of Part III, as follows:
>
> [161] Both ss. 19A and 19B of Part III are constitutional presumptions as to births. Section 19A codifies in part the international principle of flag state jurisdiction and applies in relation to persons who are born on a vessel such that their birth there is attributed to the place of registration of the vessel. Section 19B applies in relation to children who are found abandoned in any given place such that the place of abandonment is treated as their place of birth and where their mother is also permanently resident there.
>
> [162] All the above sections, namely ss. 17, 19, 19A and 19B exist as supplementary or filler sections – so to speak – to supplement or to close any gaps or to resolve technicalities that may arise when the person's parents' identity is in issue or even if their own place of birth is in issue so long as that is a relevant question for the purposes of Part I or Part II respectively.

[31] With this forming the framework on the interpretation of the Federal Constitution, the Federal Court proceeded to analyse the facts and evidence presented in *CCH* before coming to a finding as below:

> [55] In the present case, we took pains to emphasise that throughout the course of this case, it has been an accepted fact that the child is an abandoned child who was born in Hospital Universiti Kebangsaan Malaysia, Cheras. This fact was acknowledged in the adoption order and in the third birth certificate ...

A [56] … The follow-up words in s. 19B are contained in the phrase "until the contrary is shown". Meaning, any person who claims that the child was not "found exposed" or otherwise abandoned by the mother as the case may be, bears the burden of showing the identity of the mother and more importantly, that the mother is not permanently resident at the place of the finding.

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[32] Although in analysing the facts in this present case before this court, the sympathy of this court on the suffering of the said child accompanies, but it should not cloud this court's route in coming to any determination on the issues arising. It is on this basis and the *dictum* of the principles in the above cases cited, whether this court could and ought to form the view that in the C present case, the said child is an abandoned child.

[33] There are evidence to the contrary to show on the balance of probabilities that the mother of the child with the existence of the agent who accepted the payment sum of RM20,000 and the doctor all acted in concert to sell the said child. As firstly, whether the child was in fact born at Sinova D Medical Centre could not be ascertained contrary to *CCH*, as highlighted in the deliberation by this court above the first applicant himself was handed custody of the child at the age of the child a day old at a house in Kulai.

[34] Having concluded this, the *jus soli* principle therefore is satisfied in E *CCH*, unlike in this present case where the place of birth is disputed and unknown. Be that as it may, the Federal Court in *CCH* said further as follows, it being earlier extracted and produced in this judgment but for ease of reference is presented again:

[161] Both ss. 19A and 19B of Part III are constitutional presumptions as F to births. Section 19A codifies in part the international principle of flag state jurisdiction and applies in relation to persons who are born on a vessel such that their birth there is attributed to the place of registration of the vessel. Section 19B applies in relation to children who are found **abandoned** in any given place such that the place of abandonment is treated as their place of birth and where their G mother is also permanently resident there. (emphasis added)

[162] All the above sections, namely ss. 17, 19, 19A and 19B exist as supplementary or filler sections – so to speak – to supplement or to close any gaps or to resolve technicalities that may arise when the person's parents' identity is in issue or even if their own place of H birth is in issue so long as that is a relevant question for the purposes of Part I or Part II respectively. (emphasis added by the dissenting judgment of the Federal Court)

[35] Hence, the need to determine if in fact the child is 'found exposed' or abandoned (which is used interchangeably in *CCH*) and if the aid of s. 19B I comes into play, s. 19B of the 2nd schedule which provides as follows:

19B. For the purposes of Part I and II of this Schedule any new born child found exposed in any place shall be presumed, until the contrary is shown, to have been born there of a mother permanently resident there; and if he is treated by virtue of this section as so born, the date of the finding shall be taken to be the date of the birth.

[36] The presumption in s. 19B is tied to the place of birth. In *CCH*, the finding was that the child was born in HUKM and abandoned. In this present case, the place of birth could not be ascertained although no doubt the child aged a day old would have probably been born here in Malaysia. Following the analysis of the Federal Court in *CCH*, even if the parents' identity is in issue or even if their own place of birth is in issue, but with the finding that the child was born in HUKM and abandoned (*CCH supra*), it thus moved the Federal Court to come to a finding with the aid of the presumption that the mother, permanently resident there.

[37] In this present case before the court, the presence of an unidentified agent readily with the information of a new born child but place of birth could not be ascertained but with custody of the child, delivered to the first applicant at a house in Kulai with payment of RM20,000, whether these are primary facts to trigger the presumption in s. 19B to move this court to allow citizenship by operation of law, is now an issue. As before the presumption could be triggered, the child must first be 'found abandoned'.

[38] To this court's view, the totality of the facts give rise to a finding that the child is not 'exposed' or 'abandoned', this as earlier found by this court, having determined that all were acting in concert from the birth mother of the child, the doctor, the agent and the first applicant who had planned the trading of this child for money, that goes against the rights of the child encompassed in the Federal Constitution and other written laws of this country.

[39] The unavailable identity of the mother, the agent and the maternity records raise more questions to this matter. This is added by the absence of a police report as required under s. 9 of the Births And Deaths Registration Act 1957 (Revised – 1983) as follows:

Part II – Registration Of Births

Section 9. Information concerning finding of new-born child to be given to Registrar within fourteen days.

Where any living new-born child is found exposed, it shall be the duty of the person finding the child, and of any person in whose charge the child may be placed, to give to the best of his knowledge and belief to the Registrar, before the expiration of fourteen days from the date on

which the child was found, such information of the particulars required to be registered concerning the birth of the child as the informant possesses, and in the presence of the Registrar to sign the register:

> Provided that the giving of information and the signing of the register by any one of the said persons shall act as a discharge of any duty under this section of any other of them.

[40] In *CCH*, there was no reference made to s. 9 of the Births And Deaths Registration Act 1957, thus how the effect of its absence would have a bearing on the decision of the court is unknown. The fact that the child ended in a good home should not deviate from the real issue that trading of a child is against the law, even without any prosecution being brought by the Public Prosecutor. This court should not further proceed to legalise the trading of this child by allowing the relief sought by the first and second applicants for citizenship of the child as otherwise the floodgate would be open for more illegal cases of such nature of a traded child regardless of a Malaysian birth mother or unknown, having foreseen it ends with a justified result of citizenship to the said child.

[41] It must be remembered that the rights accorded to a child in the Convention encompasses rights of legal protections before and after birth, and is applicable to all children. Therefore, it is only just and fair that the legal protection be extended to cover protection against such illegal activity that can be seen happening at present to even an unborn child by a clear prohibition against such acts that goes to the root cause. To quote judge Ida Malosi, Principal Youth Court Judge of New Zealand who says 'law is but a blunt instrument to protect children. It needs to be tampered with common sense and often these two do not co-exist'.

[42] Currently, from the reported cases, this court takes judicial notice a surge in such applications with the involvement of a third party having information of a new born child but went missing or could not be contacted subsequently (to name a few of the cases see: *AKL & Anor v. Pendaftar Besar Kelahiran Dan Kematian, Malaysia* [2023] 1 LNS 341, *Lau Tek Peng & Ors v. Kementerian Dalam Negeri & Anor* [2023] 1 LNS 376, *Chong Siew Tha & Anor v. Pendaftar Besar Kelahiran dan Kematian, Malaysia* [2023] 1 LNS 853). It is equally this court's duty not to be too lenient in interpreting the Federal Constitution so as to go against the protection and policies accorded by the Federal law, they being constitutionally enacted and passed by Parliament.

[43] As to the application under art. 15A, it is an application made to the Federal Government as provided specifically by the Federal Constitution as follows:

> **Special power to register children**
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> 15A. Subject to Article 18, the Federal Government may, in such special circumstances as it thinks fit, cause any person under the age of twenty-one years to be registered as a citizen.

That being the case, it is not for this court to encroach the clear provision of the Federal Constitution and must leave it to the wise decision of the relevant authority. This approach is consistent with the stand taken by Ahmad Kamal Shahid J in *Auengchoon & Anor v. Ketua Pengarah Pendaftaran Negara Malaysia & Ors* [2023] 1 LNS 336.

[44] For all these reasons above, the application in encl. 1 is dismissed. Having decide so, this court in ensuring that the child is continuously protected, is guided by the fact that an adoption order has been issued earlier by the Sessions Court.

Endnotes:

1. Article 14. Citizenship by operation of law.
   (1) Subject to the provisions of this Part, the following persons are citizens by operation of law, that is to say:
      (a) every person born before Malaysia Day who is a citizen of the Federation by virtue of the provisions contained in Part I of the Second Schedule; and
      (b) every person born on or after Malaysia Day, and having any of the qualifications specified in Part II of the Second Schedule.
2. Part II [Article 14(1)(b)].

   Citizenship By Operation Of Law Of Persons Born On Or After Malaysia Day

   1. Subject to the provisions of Part III of this Constitution, the following persons born on or after Malaysia Day are citizens by operation of law, that is to say:
      (a) every person born within the Federation of whose parents one at least is at time of the birth either a citizen or permanently resident in the Federation; and
      (b) every person born outside the Federation whose father is at the time of the birth a citizen and either was born in the Federation or is at the time of the birth in the service of the Federation or of a State; and
      (c) every person born outside the Federation whose father is at the time of the birth a citizen and whose birth is, within one year of its occurrence or within such longer period as the Federal Government may in any particular case allow, registered at a consulate of the Federation or, if it occurs in Brunei or in a territory prescribed for this purpose by order of the Yang di-Pertuan Agong, registered with the Federal Government; and

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(d) every person born in Singapore of whose parents one at least is at the time of the birth a citizen and who is not born a citizen otherwise than by virtue of this paragraph; and

(e) every person born within the Federation who is not born a citizen of any country otherwise than by virtue of this paragraph.

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3. *(supra).*

4. 19B. For the purposes of Part I and II of this Schedule any newborn child found exposed in any place shall be presumed, until the contrary is shown, to have been born there of a mother permanently resident there; and if he is treated by virtue of this section as so born, the date of the finding shall be taken to be the date of the birth.

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